



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

January 22, 1998

Ms. Edna Ramon Butts  
Deputy Commissioner  
Legal and Compliance Division  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

OR98-0209

Dear Ms. Butts:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 112060.

The Texas Department of Insurance (the "department") received a request for all consumer complaints related to failure or refusal to pay for emergency care received by the department since October 1, 1996, concerning Kaiser Foundation Health Plan of Texas ("Kaiser"). You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. In addition, because you also assert that a third party's privacy or property interest may be implicated by this request, you raise section 552.305 of the Government Code. We have considered the exceptions you claim and have reviewed the sample documents you submitted.<sup>1</sup>

Pursuant to section 552.305 of the Government Code, this office notified Kaiser of the request. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). Kaiser responded to our notice, claiming that the requested information is excepted from required public disclosure based on Government Code section 552.101 in conjunction with various confidentiality statutes, the common-law right to privacy, and the constitutional right to privacy.

Section 552.101 of the Government Code excepts from required public disclosure information that is deemed confidential by law, including information that is made confidential by statute. The Seventy-fifth Legislature amended section 17 of the Texas Health Maintenance Organization Act, Chapter 20 of the Insurance Code, to add the following provision to subsection (b):

The Commissioner may examine and use the records of a health maintenance organization, including records of a quality of care assurance program and records of a medical peer review committee as that term is used in Section 1.03, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes), as necessary to carry out the purposes of this Act, including an enforcement action under Section 20 of this Act. That information is confidential and privileged and is not subject to the open records law, Chapter 552, Government Code, or to subpoena except as necessary for the commissioner to enforce this Act.

Ins. Code art. 20A.17(b)(4). We believe that this provision provides broad coverage for all records from the health maintenance organizations that the department examined or used in carrying out the purposes of the Health Maintenance Organization Act, including the health maintenance organizations' records of their quality of care assurance program and their medical peer review committees. The provision permits the release of information when "necessary for the commissioner to enforce" the Health Maintenance Organization Act. *Id.* Thus, the department must withhold from public disclosure all information that the department obtained from the health maintenance organization. Gov't Code § 552.101. We have marked the type of information that we believe is covered by this provision.

Although the department and Kaiser assert that some of the medical records submitted in response to the request are confidential under the Medical Practice Act, we do not find medical records among the submitted documents. Section 5.08 of the Medical Practice Act, V.T.C.S. article 4495b (the "MPA"), provides:

(a) Communications between one licensed to practice medicine, relative to or in connection with any professional services as a physician to a patient, is confidential and privileged and may not be disclosed except as provided in this section.

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are

confidential and privileged and may not be disclosed except as provided in this section.

In addition, section 5.08(j)(3) provides for further release of confidential medical records obtained with a valid consent for release only if the disclosure "is consistent with the authorized purposes for which consent to release the information was obtained." *See also* V.T.C.S. art. 4495b, § 5.08(c). Upon review of the submitted records, we find that none were *created or maintained by a physician*, and thus may not be withheld from disclosure under the MPA in conjunction with section 552.101 of the Government Code.<sup>2</sup>

Most of the submitted information contains confidential medical information not covered by a confidentiality statute, yet protected from required public disclosure based on common-law privacy. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).<sup>3</sup> Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *See id.* This office has determined that common-law privacy protects certain financial information, including information about personal financial decisions. *See* Open Records Decision No. 600 (1992) at 9-12. In this instance, we believe that the identities of Kaiser enrollees is private information. Therefore, the department must redact any identifying information in the remaining submitted documents, including names, street addresses, telephone numbers, social security numbers, names of family members, names of employers, and individual and group policy numbers.<sup>4</sup> We have marked a sample of the types of identifying information which must be withheld from disclosure.

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<sup>2</sup>After examining the documents, we do not believe that the other statutes Kaiser raises protect any of the information at issue, as none of the documents constitute protected communications under these statutes. Nor were these records created or maintained by the person specifically enumerated by the statutes. *See, e.g.*, Health & Safety Code § 611.002(a) (mental health records); Health & Safety Code § 241.151 *et seq.* (hospital information); 42 C.F.R. §§ 2.1-2.67 (relating to substance abuse, education, prevention, training, treatment, rehabilitation or research).

<sup>3</sup>We note that the scope of information considered private under the constitutional privacy doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)).

<sup>4</sup>Common-law privacy may also protect an individual's medical history, although it does not protect all medically related information. *See* Open Records Decision No. 478 (1987). Individual determinations are required. *See* Open Records Decision No. 370 (1983). However, in light of our conclusion in this instance that the enrollees' identities must be withheld from disclosure, making individual determinations regarding medically related information is unnecessary.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch  
Assistant Attorney General  
Open Records Division

VDP/gle

Ref.: ID# 112060

Enclosures: Marked documents

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